Supreme Court, U.S.
FILED
APR 2 1992
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(4)

No. 91-1425

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1991

DANIEL VASQUEZ, Warden, and
DANIEL E. LUNGREN,
Attorney General of the State of California,
Petitioners,

vs.

JOHN G. BROWN,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Does a United States District Court have jurisdiction to stay the execution of a state prisoner pending appointment of counsel to assist the prisoner in preparing and filing a habeas corpus petition?

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent, John G. Brown ("Brown"), hereby responds to the Petition for Writ of Certiorari (the "Petition") filed by petitioners Daniel Vasquez, Warden, California, State Prison at San Quentin, California, and Daniel E. Lungren, Attorney General of the State of California ("the State"), seeking review of the judgment and opinion of the United States Court of

Appeals for the Ninth Circuit, issued on December 31, 1991 and published as Brown v. Vasquez, 952 F.2d 1164 (9th Cir. 1991).

ADDITIONAL STATUTE INVOLVED

28 U.S.C. § 1651(a), The All Writs Act, provides: "The Supreme Court and all courts established by act of congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."

STATEMENT OF THE CASE

Brown was convicted of murder of a peace officer in California state court and was sentenced to death. The conviction and sentence were affirmed on appeal. People v. Brown, 46 Cal.3d 432, 250 Cal. Rptr. 604, 758 P.2d 1135 (1988), cert. denied, 489 U.S. 1059, 109 S. Ct. 1329, 103 L. Ed. 2d 597 (1989). The California Supreme Court denied Brown's petition for a writ of habeas corpus and the Orange County Superior Court then set Brown's execution date for June

8, 1990. Brown v. Vasquez, 743 F. Supp. 729 (C.D. Cal. 1990).

On June 1, 1990, acting pro se, Brown filed a "Request for Appointment of Counsel in Death Sentence Case and for Stay of Execution of Death Sentence." Brown, 743 F. Supp. at 729. Brown's June 1, 1990, request for stay was accompanied by a declaration stating: "I intend to file a petition for writ of habeas corpus in this court, alleging federal constitutional errors which entitle me to relief from the judgment of death. I need the assistance of counsel in preparing and litigating the petition." Brown, 743 F. Supp. at 729-730. Brown also stated he was, "under imminent sentence of death, that the attorney who represented him in state court [was] unavailable to represent him in his federal habeas proceedings and that he [could not] afford to retain an attorney".

On June 1, 1990, the district court issued an order staying execution of the sentence for a 45-day period, pursuant to C.D. Cal. Local Rule 26.8.7(b). Shortly thereafter, the State moved to vacate the stay of execution. On July 7, 1990, the 45-day

stay was extended for an additional 30 days, "primarily because the court had not yet secured qualified counsel for appointment." Brown, 743 F. Supp. at 730. On July 30, 1990, the court appointed counsel to represent Brown, and on August 8, 1990, that counsel filed Brown's opposition to the State's motion to vacate the stay of execution and also applied for a 120-day stay under Local Rule 26.8.7(c). In contrast to the State's statement of the facts, and "[a]s required by Local Rule 26.8.7(c), in his application for [the 120-day] stay, [Brown's] counsel made a preliminary specification of non-frivolous constitutional issues which could be raised. Counsel . . . specified six separate issues which are summarized in three pages." Brown, 743 F.Supp. at 732 n. 10. The 120-day stay was granted on August 10, 1990, and was subsequently extended to permit petitioner's counsel the opportunity to investigate and present petitioner's habeas corpus petition. Id.

On September 4, 1990, the district court filed its opinion denying respondent's motion to vacate the stay. The State appealed to the Ninth Circuit, which heard the matter on August

29, 1991. On November 4, 1991, Respondent filed his habeas corpus petition alleging 29 separate constitutional claims. On December 31, 1991,[1] the Ninth Circuit affirmed the district court judgment. Brown v. Vasquez, 952 F.2d 1164 (9th Cir. 1991).

SUMMARY OF ARGUMENT

The issue raised by the State is moot. Brown has already filed his federal habeas petition. Even if, arguendo, the issue is "capable of repetition", it is not "evading review." The State can raise the issue in a case in which no petition has yet been filed.

The Petition should also be denied because the Ninth Circuit correctly decided the issue. The approach taken by the Ninth Circuit is reasoned and practical particularly after the Court's decision in McCleskey v. Zant, 499 U.S. __, 111 S. Ct. 1454 (1991) in which the Court held that a federal habeas petitioner must assert all possible constitutional issues in an initial petition or risk losing potentially viable claims. Local

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[1] A few lines of this decision were amended on February 19, 1992.

Rule 26.8.7 ensures that the petitioner has a meaningful opportunity to comply with the mandate of McCleskey. The State's principal purported authorities for its position are not on point. Demosthenes v. Baal, 110 S. Ct. 2223 (1990) is a standing case, not a jurisdiction case. In re Blodgett, 112 S. Ct. 674 (1992), has nothing to do with the instant case. 28 U.S.C. § 2251 provided an adequate basis for the district court's jurisdiction, and even if it did not, the All Writs Act (28 U.S.C. §1651(a)) provides an adequate independent jurisdictional basis. Finally, it is anomalous for the State Attorney General to be seeking Supreme Court review of a district court local rule when that Attorney General was part of the task force that promulgated that rule.

ARGUMENT

1. This Case Is Moot.

The State's Petition is moot. Brown has already filed his federal habeas petition. Even if the issue arguably is "capable of repetition", it is not "evading review." The State can raise

the issue in any one of the cases it cites in which no petition has yet been filed.

2. The Ninth Circuit's Decision Is Correct.

The Petition should also be denied because the Ninth Circuit fully considered and correctly decided the issue.

The State contends that Demosthenes v. Baal, 495 U.S. 731, 110 S. Ct. 2223 (1990), holds that the filing of a formal habeas corpus petition is a prerequisite for district court jurisdiction to issue a stay of execution. Demosthenes holds no such thing. Demosthenes is a standing case, not a jurisdiction case. The only holding in Demosthenes is that those who sought to assert the rights of the petitioner in that case did not have standing to do so.

Here, the Ninth Circuit and the district court correctly found two different adequate bases for the issuance of the stay, namely, 28 U.S.C. § 2251 and 28 U.S.C. § 1651(a) (the All Writs Act).

Title 28 U.S.C. § 2251 authorizes a district court judge, "before whom a habeas corpus proceeding is pending" to issue a

stay of execution. The Ninth Circuit correctly rejected the State's contention that "habeas corpus proceeding" must be interpreted so narrowly that a habeas corpus proceeding cannot be said to be "pending" even after a death penalty prisoner has filed an application for the appointment of counsel to assist in the preparation of his habeas corpus petition as authorized by C.D. Local Civil Rule 26.8.7. The Ninth Circuit's rejection of that narrow construction has firm support. The Court has repeatedly admonished that the writ of habeas corpus is not a narrow, formalistic remedy, rather it is a remedy that must be administered with initiative and flexibility. Jones v. Cunningham, 371 U.S. 236, 243 (1963); Harris v. Nelson, 394 U.S. 286, 290-291 (1969).

The All Writs Act, 28 U.S.C. §1651(a), provides an adequate independent basis for the district court's exercise of jurisdiction. The All Writs Act authorizes all federal courts, including district courts, to issue injunctive orders to preserve their potential jurisdiction. FTC v. Dean Foods Co., 384 U.S. 597, 603-605 (1965); Application of United States of America

for an Order Authorizing an In-Progress Trace of Wire Communications Over Telephone Facilities, 616 F.2d 1122, 1129 (9th Cir. 1980). In this case, the district court properly held that the All Writs Act authorized it to issue the stay of execution in order preserve its potential habeas jurisdiction. Brown v. Vasquez, 743 F. Supp. at 731-732.

Here, the Ninth Circuit reasoned, "[t]he admonition to interpret the federal habeas corpus statute with 'initiative and flexibility' is especially relevant in the present case in light of the Court's recent decision in McCleskey v. Zant," 499 U.S. __, 111 S. Ct. 1454, 113 L. Ed. 2d 517 (1991). Brown v. Vasquez, 952 F.2d 1164, 1166 (9th Cir. 1991). McCleskey requires the prisoner to assert all possible violations of his constitutional rights in his initial application or risk losing potentially viable claims. McCleskey, 111 S. Ct. at 1472. If a district court is forced to require a prisoner file that now all-important first petition before the district court can stay that prisoner's execution to permit the appointment of counsel to

assist in the preparation of that very petition, the door to habeas relief will be effectively sealed.

The Ninth Circuit took a very practical and reasoned approach to the reality of post-McCleskey habeas corpus practice. That approach is not in need of further review.

In re Blodgett, __ U.S. __, 112 S. Ct. 674 (1992), has nothing to do with this case. In Blodgett, the Court denied a petition for a writ of mandamus directing the court of appeal to issue its decision on a two-year old appeal from the denial of a second federal habeas petition. Id. at 675. Blodgett stands for the proposition that a court of appeal has a duty to consider claims raised in appeals from denials of successive habeas petitions without delay. Id. at 676. In marked contrast, this case does not involve successive petitions, the district court has not yet ruled on the first petition, the court of appeal did not have before it any appeal from a denial of a petition, and there has been no delay.

Finally, it is anomalous for the State Attorney General to be attacking the local rules in question when he was part of the task force that led to their promulgation.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Dated: April 2, 1992

Respectfully submitted,

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